

**BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION**

KURT R. MOLER

Claimant

VS.

DAVIS ELECTRIC, INC.

Respondent

AND

PATRONS INSURANCE CO.

Insurance Carrier

Docket No. 1,030,000

ORDER

STATEMENT OF THE CASE

Respondent and its insurance carrier (respondent) and claimant requested review of the December 21, 2012, Award entered by Administrative Law Judge (ALJ) Pamela J. Fuller. The Board heard oral argument on April 19, 2013. Terry J. Malone, of Dodge City, Kansas, appeared for claimant. Scott J. Mann, of Hutchinson, Kansas, appeared for respondent.

The ALJ found claimant had a 14 percent permanent partial impairment to the body as a whole.

The Board has considered the record and adopted the stipulations listed in the Award.

ISSUES

Claimant contends he is entitled to a 23 percent permanent partial impairment to the whole body.

Respondent requests review of the ALJ's finding that claimant was entitled to an impairment to the whole body. Respondent argues claimant should be limited to a scheduled injury to the left leg.

The issue for the Board's review is: What is the nature and extent of claimant's disability?

FINDINGS OF FACT

Claimant worked for respondent as an electrical helper. On May 29, 2004, he fell from an extension ladder and injured his left leg. Claimant reported his accident but did not seek medical treatment for about a week. Respondent sent claimant to Dr. Guillermo Garcia, who treated claimant for a torn meniscus in his left knee. Claimant underwent surgery performed by Dr. Garcia on August 2, 2004, and continued under Dr. Garcia's care until he was released as being at maximum medical improvement in January 2005. Claimant was released with restrictions to limit kneeling, squatting, and ascending and descending stairs. In March 2005, claimant left his employment with respondent, at the recommendation of Dr. Garcia, who told claimant he needed to stop climbing ladders. He began working for another company as a salesman. His new job required him to do a lot of walking and driving.

Claimant, however, continued to have problems with his left knee. He had pain in the back of his left leg, the top part of his leg, and into the bottom part of his knee. Claimant returned to Dr. Garcia several more times in 2005 with complaints of pain and swelling in his left knee. He previously developed a limp, which had worsened over time. Claimant was unhappy with the results of his knee surgery and asked Dr. Garcia for recommendations. Dr. Garcia gave claimant the name of Dr. Bradley Bruner, but respondent would not authorize treatment with Dr. Bruner. Respondent's attorney told claimant he would send a list of three physicians from which claimant could choose a physician. Claimant testified he never received such a list.

Claimant testified that because he had started a new job, he did not seek medical treatment in 2006 but just used over-the-counter medication for pain. Claimant returned to Dr. Garcia in January 2007 and again in May 2007. Dr. Garcia recommended a course of Hyalgan injections, which respondent would not authorize.

Claimant said his knee problem worsened, and he was suffering pain and numbness in his toes and pain down the back of his leg. In May or June 2007, claimant began to notice lower back pain, which he described as burning, tingling, throbbing and numbness. At the insistence of his wife, claimant saw a chiropractor in June 2007 for the back pain. Claimant discontinued the chiropractic treatment after three visits, as the treatments were not resolving his pain.

In November 2007, claimant returned to Dr. Garcia. He was still limping, which was causing an increase in his back symptoms. On his own, claimant sought treatment from Dr. Chris Lewonoski for his back problems and Dr. Ian Kovach for his left knee problems. Dr. Kovach performed arthroscopic surgery on claimant's left knee in March 2008. Dr. Lewonoski performed surgery on claimant's lumbar spine, a fusion at L5-S1, in May 2008. Claimant said he received physical therapy after both surgeries, and his limp went away and his back got stronger.

Claimant testified his back pain did not start until May or June 2007, three years after his work-related accident. However, the accident caused claimant to have a significant limp that continuously worsened, which he believes was the cause of his back pain.

Dr. Pedro Murati, a certified independent medical examiner, is board certified in electrodiagnostic medicine and rehabilitation and physical medicine. He first examined claimant on June 19, 2007, at the request of claimant's attorney. In June 2007, claimant's chief complaints were constant numbness and tingling in his left foot, popping and grinding in his left knee, pain and swelling in his left knee, pain in the back of his left knee, and low back pain radiating into the hips. After performing an examination, Dr. Murati diagnosed claimant with left SI joint dysfunction, left trochanteric bursitis secondary to antalgia, post left knee arthroscopic medial meniscectomy, and low back pain secondary to radiculopathy secondary to antalgia. He opined that all claimant's current diagnoses were within a reasonable medical probability a result of his work-related accident on May 29, 2004. Dr. Murati said regardless of the fact that claimant did not have back problems until June 2007, more than three years after the accident, he can still relate the back pain to claimant's accident at work in May 2004, based on the history of claimant's knee injury.

Dr. Murati recommended claimant have cortisone injections, physical therapy, anti-inflammatory medication and pain medication for his SI joint dysfunction and trochanteric bursitis. For claimant's low back pain secondary to radiculopathy, Dr. Murati recommended a lumbar MRI to rule out disc pathology and an NCS/EMG to evaluate or document radiculopathy. Based on the results of those tests, Dr. Murati recommended the appropriate physical therapy, anti-inflammatory medication, pain medication and a series of lumbar epidural steroid injections. If claimant failed to improve with conservative treatment, Dr. Murati recommended a surgical evaluation. For claimant's left knee, Dr. Murati recommended cortisone injections and, if he has no improvement, Synvisc injections. He also recommended anti-inflammatory medication and pain medication as needed.

Dr. Murati saw claimant a second time on January 5, 2010. At that time, claimant complained of pain in his lower back, pain of the left knee, and trouble sitting and standing for long periods of time. After Dr. Murati's examination of claimant's history and medical records and performing a second examination, he opined that claimant had low back pain with signs and symptoms of radiculopathy, post left knee arthroscopy with partial medial meniscectomy, chondroplasty of the medial femoral condyle, left patellofemoral syndrome, and post fusion at L5-S1. He gave claimant permanent restrictions of no crawling or use of repetitive foot controls on the left. Claimant could rarely bend, crouch, stoop, climb stairs or ladders, and squat. Claimant could occasionally sit, stand, walk and drive. Dr. Murati gave claimant a lifting restriction of nothing over 35 pounds, occasional lifting up to 35 pounds, and frequent lifting up to 20 pounds. Claimant was to alternate sitting, standing and walking.

Using the *AMA Guides*,¹ Dr. Murati placed claimant in DRE Lumbosacral Category IV for a 20 percent whole person impairment. For claimant's patellofemoral syndrome, he rated claimant as having a 5 percent left lower extremity impairment. For claimant's status post partial medial menisectomy, he rated claimant as having a two percent left lower extremity impairment. Claimant's lower extremity ratings would convert and combine with claimant's body as a whole rating for a total 22 percent whole body impairment.

Dr. Erik Severud, a board certified orthopedic surgeon, examined claimant on October 25, 2007. Claimant's primarily complaint was his left knee, but in the course of the evaluation, Dr. Severud stated that claimant's biggest concern was his back. Claimant told Dr. Severud about 90 percent of his pain was from his back.

Dr. Severud took a history from claimant and reviewed claimant's medical records. Dr. Severud noted claimant's injury date was May 29, 2004, and the injury was to claimant's left knee. It was not until sometime later that claimant started having issues with his back. From his review of claimant's medical records, Dr. Severud could not find any causation to relate to claimant's lower back. Dr. Severud stated:

However, the patient, according to the records available to me, never complained of back pain until recently. It is absurd to claim that some knee soreness and slight limping resulted in severe degenerative disc disease. I find no evidence of causation for the back and radicular symptoms from the injury on 5-29-04.²

Based on the *AMA Guides*, Dr. Severud rated claimant as having a 2 percent permanent partial impairment to the left lower extremity.³ He said claimant was at maximum medical improvement. Dr. Severud did not assign claimant any permanent restrictions. Dr. Severud recommended claimant seek treatment for his low back condition through private health insurance.

Dr. Terrence Pratt, a certified independent medical examiner who is also board certified in physical medicine and rehabilitation, examined claimant on two occasions, both at the request of the ALJ. His first examination of claimant was on August 16, 2007. Claimant complained of low back pain with radicular symptoms and intermittent left knee problems. After taking a history and reviewing claimant's medical records, Dr. Pratt noted that claimant had a history of medial meniscus tear and had two medial meniscus repair

¹ American Medical Association, *Guides to the Evaluation of Permanent Impairment* (4th ed.). All references are based upon the fourth edition of the *Guides* unless otherwise noted.

² Severud Depo., Ex. 2 at 7.

³ Dr. Severud acknowledged his impairment rating was given before claimant had another surgery on his left knee performed by Dr. Kovach. He was also not aware that claimant had back surgery performed by Dr. Lewonoski.

surgeries before his May 2004 accident. Claimant also had degenerative disc disease in his lumbar spine. Dr. Pratt recommended claimant's degenerative disc disease of the low back be addressed before any further treatment on claimant's left knee.

Dr. Pratt evaluated claimant again on August 5, 2010. He again did a records review, which showed claimant had surgery to his low back on May 15, 2008, and surgery to his left knee on March 31, 2008.

Dr. Pratt said it was a common occurrence that persons who have an altered gait due to knee injuries aggravate preexisting degenerative disc disease in the lower back. In Dr. Pratt's opinion, that is what happened in claimant's case. Dr. Pratt would have expected claimant to have had an altered gait soon after his left knee injury and the surgery. He also would have expected claimant to have complaints of back pain earlier than three years. He had no explanation for why claimant did not complain of back pain earlier, but he noted claimant's medical records showed Dr. Garcia had opined that claimant had low back problems aggravated by his left knee injury. It was Dr. Pratt's opinion that the injuries claimant received on May 29, 2004, aggravated his preexisting degenerative disc disease. Dr. Pratt relied on Dr. Garcia's opinion and believed the surgery Dr. Lewonoski performed on claimant's low back in 2008 was a natural and probable consequence of the injuries sustained by claimant on May 29, 2004. Dr. Pratt further believed claimant's knee procedure performed in 2008 was reasonable and necessary as a result of the accident of May 29, 2004.

Using the *AMA Guides*, Dr. Pratt rated claimant as having a 10 percent impairment to the left lower extremity, which Dr. Pratt said was a result of the May 29, 2004, accident. Dr. Pratt said his rating was solely related to the May 29, 2004, injury, taking into account and subtracting any preexisting impairment claimant may have had.

Dr. Pratt also rated claimant as having a 20 percent permanent partial impairment to the whole body for the lumbosacral involvement. In calculating this rating, Dr. Pratt utilized the Range of Motion Model to differentiate with the DRE model. Dr. Pratt testified that of the 20 percent impairment rating, 10 percent related to factors before May 29, 2004, and the residual related to factors after May 29, 2004. The factors before May 29, 2004, would be the degeneration of the lumbar sacral region. The 10 percent impairment after May 29, 2004, would be for claimant's radicular symptoms or onset of radicular symptoms. Dr. Pratt admitted that without x-rays and examination of claimant before May 29, 2004, any opinion that claimant had permanent functional impairment before that date would be speculation. Dr. Pratt said as of August 5, 2010, claimant had a 20 percent permanent partial impairment to the whole body. Without having examined claimant before May 29, 2004, Dr. Pratt could not state with any certainty that claimant had any disability or permanent functional impairment as a result of his then-existing degenerative disc disease.

Dr. Pratt said in converting the lower leg impairment to body as a whole and combining it with the 20 percent permanent partial impairment for the lumbar spine, claimant would have a total 23 percent functional impairment to the whole body.

PRINCIPLES OF LAW

K.S.A. 44-501(a) states in part: "In proceedings under the workers compensation act, the burden of proof shall be on the claimant to establish the claimant's right to an award of compensation and to prove the various conditions on which the claimant's right depends."

K.S.A. 44-501(c) states: "The employee shall not be entitled to recover for the aggravation of a preexisting condition, except to the extent that the work-related injury causes increased disability. Any award of compensation shall be reduced by the amount of functional impairment determined to be preexisting."

K.S.A. 2003 Supp. 44-508(g) defines burden of proof as follows: "'Burden of proof' means the burden of a party to persuade the trier of facts by a preponderance of the credible evidence that such party's position on an issue is more probably true than not true on the basis of the whole record."

An accidental injury is compensable under the Workers Compensation Act even where the accident only serves to aggravate a preexisting condition.⁴ The test is not whether the accident causes the condition, but whether the accident aggravates or accelerates the condition.⁵ An injury is not compensable, however, where the worsening or new injury would have occurred even absent the accidental injury or where the injury is shown to have been produced by an independent intervening cause.⁶

ANALYSIS

The primary issue on appeal is nature and extent of disability. As such, the analysis by the Board will focus on the three physicians who provided testimony relating to the extent of claimant's disability. Two of the three physicians agree that claimant suffers an impairment to the low back as a result of the May 29, 2004, injury.

⁴ *Bryant v. Midwest Staff Solutions, Inc.*, 292 Kan. 585, 257 P.3d 255 (2011); *Odell v. Unified School District*, 206 Kan. 752, 758, 481 P.2d 974 (1971).

⁵ *Woodward v. Beech Aircraft Corp.*, 24 Kan. App. 2d 510, Syl. ¶ 2, 949 P.2d 1149 (1997).

⁶ *Nance v. Harvey County*, 263 Kan. 542, 547-50, 952 P.2d 411 (1997); *Claphan v. Great Bend Manor*, 5 Kan. App. 2d 47, 611 P.2d 180, rev. denied 228 Kan. 806 (1980).

Dr. Murati assessed a 20 percent impairment to the body as a whole for the claimant's low back based upon the *AMA Guides* DRE Category IV for the lumbosacral spine. He assessed a 5 percent impairment for patellofemoral syndrome of the left knee and a 2 percent impairment for claimant's status post partial medial menisectomy on the left knee. Dr. Murati found a combined impairment of 22 percent of the body as a whole. Dr. Murati did not assess any portion of his rating to a preexisting condition.

Dr. Severud, the only orthopedic surgeon to testify in this case, assessed a 2 percent impairment to the left knee based upon the *AMA Guides*. Dr. Severud opined that it was "absurd to claim that some knee soreness and slight limping resulted in severe degenerative disc disease."⁷ The ALJ and two other examining physician disagreed with Dr. Severud's conclusions regarding the cause of the low back condition.

Dr. Pratt, the court appointed neutral physician, assessed a 20 percent impairment to the body as a whole for claimant's low back and a 10 percent impairment for claimant's left knee. The combined rating by Dr. Pratt is 23 percent. Dr. Pratt initially assessed a 10 percent impairment to the body as a whole as a result of a preexisting condition of the low back. The ALJ accepted this opinion and reduced the amount of the award to reflect a 10 percent preexisting impairment. Dr. Pratt's testimony does not support this finding by the ALJ.

Dr. Pratt was equivocal on his preexisting impairment opinion. He agreed it was speculation to suggest that claimant had any permanent impairment based upon the *AMA Guides* prior to May 29, 2004. His opinion was based solely upon the existence of degenerative disc disease. He testified that he had not examined claimant prior to and had no medical records that predated the 2004 injury. Dr. Pratt, when asked if he could state whether claimant had a preexisting permanent functional impairment as a result of the degenerative disc disease, stated, "Not with certainty, as we talked about earlier without plain films and examination."⁸

Dr. Pratt, when asked if the May 29, 2004 injury aggravated claimant's preexisting degenerative condition of the low back, testified that the accident and factors following the accident led to his current condition and need for care. He stated that the factors following the injury were "knee involvement with period of altered gait."⁹

⁷ Severud Depo, Ex. 2 at 7.

⁸ Pratt Depo. at 18.

⁹ *Id.* at 17.

K.S.A. 44-510e(a) states, in part:

Functional impairment means the extent, expressed as a percentage, of the loss of a portion of the total physiological capabilities of the human body as established by competent medical evidence and based upon the fourth edition of the American Medical Association Guides to the Evaluation of Permanent Impairment, if the impairment is contained therein.

K.S.A. 44-501(c) says that any award of compensation shall be reduced by the preexisting functional impairment. The definition of functional impairment contained in K.S.A. 44-510e(a) requires functional impairment to be based upon the *AMA Guides*. The Kansas Court of Appeals, in an unpublished opinion, provided guidance by stating:

For an award to be reduced by an amount of preexisting functional impairment, the current injury must constitute an aggravation of the preexisting condition. *Lyons v. IBP, Inc.*, 33 Kan. App. 2d 369, 379, 102 P.3d 1169 (2004). Once it is established that the current injury is an aggravation of the preexisting injury, the respondent has the burden of proving the amount of preexisting impairment to be deducted. *Hanson v. Logan U.S.D.* 326, 28 Kan. App. 2d 92, 95, 11 P.3d 1184 (2000), *rev. denied* 270 Kan. 898 (2001). This determination must be based upon the *AMA Guides to the Evaluation of Permanent Impairment* (4th ed. 1995). K.S.A. 44-510d(a)(23); *Criswell v. U.S.D.* 497, No. 104,517, 2011 WL 5526549, at 6-7, (Kan. App. Nov. 10, 2011), *rev. denied* (2013), (unpublished opinion).¹⁰

There is only one definition of “functional impairment” contained in the Workers Compensation Act. There is no exception in the definition of functional impairment for preexisting versus post-injury impairment. Dr. Pratt testified that he could not assess a functional impairment for a preexisting condition based upon the *AMA Guides*. As such, a credit for preexisting impairment is not supported by the record.

CONCLUSION

Based upon the foregoing, the Board finds that claimant sustained injuries to his left knee and low back as a result of his injury on May 29, 2004. Further, the Board finds that claimant did not suffer a preexisting condition for which a credit would be appropriate.

The ALJ approved the fee agreement between claimant and his attorney subject to the provisions of K.S.A. 44-536. This file contains no attorney fee agreement between claimant and his current attorney as mandated by K.S.A. 44-536(b). As such, there can

¹⁰ *Kirker v. Bob Bergkamp Construction Co., Inc.*, No. 107,058, 2012 WL 4937471 (Kansas Court of Appeals unpublished opinion filed Oct. 12, 2012).

be no approval of that fee agreement. Should claimant's counsel desire a fee be approved, he must file and submit this written contract to the ALJ for approval.

AWARD

WHEREFORE, it is the finding, decision and order of the Board that the Award of Administrative Law Judge Pamela J. Fuller dated December 21, 2012, is modified to reflect a 23 percent permanent impairment to the body as a whole.

Claimant is entitled to 8.13 weeks of temporary total disability compensation at the rate of \$440.00 per week or \$3,577.20 followed by 95.45 weeks of permanent partial disability compensation at the rate of \$440.00 per week or \$41,998.00 for a 23 percent functional disability, making a total award of \$45,575.20. As of the date of this award, all amounts are due and owing, less amounts previously paid.

IT IS SO ORDERED.

Dated this _____ day of May, 2013.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

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